

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-6091

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 75-6091

*Copy Recd 8/27/76
type & No. 1
for Judge Quarta*

RICHARD J. DE FINA,
PLAINTIFF,
v.
DEPARTMENT OF TRANSPORTATION, et al.,
DEFENDANTS-APPELLEES.

RICHARD J. DE FINA,
PLAINTIFF-APPELLANT,
v.
VIRGINIA M. ARMSTRONG, et al.,
DEFENDANTS-APPELLEES.

RICHARD J. DE FINA,
PLAINTIFF-APPELLANT,
v.
CLARENCE M. KELLY, et al.,
DEFENDANTS-APPELLEES.

RICHARD J. DE FINA,
PLAINTIFF-APPELLANT,
v.
RITCHEY WILLIAMS, et al.,
DEFENDANTS-APPELLEES.

JOINT APPENDIX

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MADELINE DE FINA, ESQUIRE
Attorney for Plaintiff-Appellant
220-31 Union Turnpike
Flushing, New York, 11364
(212) GR 9-1555

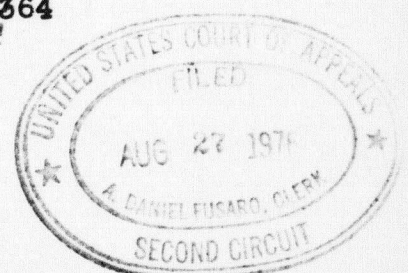


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JOINT APPENDIX

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1526 Richard J. De Fina

vs. Department of Transportation, et al 75 Civ. 1526

JUDGE KNAPP

C. 1a0 Rev. Civil Docket Continuation

DATE

PROCEEDINGS

Date Order
Judgment No.

1526- DEPARTMENT OF TRANSPORTATION. FEDERAL
AVIATION ADMINISTRATION: DENNIS S,
FELDMAN and L.J. CHURCHVILLE, individually
and as employees of the Department of
Transportation, Federal Aviation Adminis-
tration assigned to pass upon information
to be given under the FREEDOM OF INFORMATION
ACT and JOHN DOE #2, individually and as
employee of the Department of Transportation
Federal Aviation Administration,

Defendants.

3/3/76 67660 S
3/3/76 67660 S

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A

DIST/OFFICE	DOCKET		FILING DATE			J	H/S	L	R	B	DEMAND	JURY	JURY	
	YR	NUMBER	MO.	DAY	YEAR									OFFICE
208-1	75	1526	03	27	75	2	826	1				0855	75	1526

02-26-75 Action **PLAINTIFFS**

DE FINA RICHARD J. PRO-SE

DEFENDANTS RYAN, J.

DEPT. OF TRANSPORTATION FEDERAL
AVIATION ADMINISTRATION
JOHN DOE #1, individually & as
employee of the Department of
Transportation Federal Aviation
Administration & JOHN DOE #2,
individually and as an employee
of the Department of Transport
Federal Aviation
Administration.

(See preceding page for corre-
cted title)

02-26-76 75 Civ 2362 & 75 Civ 2681 is consolidated with 75-2119, 1564 & CARRY ON
75 Civ 1526.

Civil Rights. Freedom of Information Act.

ATTORNEYS

Richard J. DE Fina - Pro Se
220-31 Union Turnpike
Flushing, New York 11364

AUSA Gether
U. Atty- 791-1966

CHECK HERE IF CASE WAS FILED IN FORMA	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
<input type="checkbox"/>	MAR 27 1975	4904		JS 5	X
				JS 6	05-26-76

DATE	NR.	PROCEEDINGS	JAS
3-27-75	(1)	Filed complaint & issued summons.	
4-04-75	(2)	Filed summons & enteredd marshal's return served on: Federal Aviation Agency by certified mail 162951, 162950 3-31-75	
5-08-75	(3)	Filed stip & order that time for deft. to answer is ext. from 4-30-75 to 5-30-75. Knapp, J.	
6-27-75	(4)	Filed plttf's affidavit & notice of motion to amend name ret. 6-2-75.	
6-03-75	---	Filed Memo-endorsed on plttf's motion Filed 5-27-75 #4-Motion granted as of right. So ordered. Knapp, J.	
6-02-75	(5)	Filed AMENDED COMPLAINT.	
6-05-75	(6)	Filed summons with Marshal's return. Served. Dept. of Transportation, Fed. Aviation Admin by R. Lee on 6-3-75. Atty. General by certified mail Receipt No. 162775 on 6-3-75. Dept. of Transportation, Fed. Aviation Admin. No. 162774 6-3-75. Washington, D.C.	
6-12-75	(7)	Filed Plttf(Pro Se) Affdvt & Motion for undeleted document ret. 6/27/75, Rm. 906, 2:00 P.M.	
6-11-75	(8)	Filed ANSWER of Defts. US Atty	
6-26-75	(9)	Filed affidavit of N.L. Gerber in opposition to plttf's motion. (filed in 75 Civ 1564)	
7-02-75	(10)	Filed Memo-endorsed on plttf's motion filed 6-12-75 Re: copies & names Motion denied because it seeks the ultimate relief requested & there has been no showing of irreparable damage-on condition that deft's address themselves promptly to the merits of the action. Bonsal, J. Knapp, J.	
7-25-75	(11)	Filed plttf's affirmation & notice of motion to reconsider decision to send 75 Civ 2119 to another judge ret. 7-31-75.	
08-06-75	---	Filed Memo End. on motion of 7/25/75-Document #11. Court having already decided to accept transfer of 75 Civ. 2119 to its docket & the ALBA having consented to consolidation of 75 Civ. 1526, 1564 & 2119, motion is hereby granted and 75 Civ. 1526, 1564 and 2119 are hereby consolidated. So Ordered Knapp, J. (also docketed in 75 Civ. 1526 & 75 2119) (mm)	
09-22-75	(12)	Filed plttf's affidavit & notice of motion to reconsider the denial of motion of 6-27-75.	
09-25-75		Filed memo-end. on paper # 12. Motions denied for the reasons stated in the previous order denying said motions and for the further reason that said mtions are untimely under the Local Rules. Knapp, J. m/n	
10-08-75	(13)	Filed Govt.'s notice of motion re: consolidate 75 Civil 1526, 1564, 2119, 2362 & 2681 and as consolidated for an order dismissing the complaints therein. ret: 10-24-75. (copies also filed in 75 Civil 2362 & 2681.)	
10-08-75	(14)	Filed Govt.'s memo. of law re: motion for consolidation and dis- missal. (copies filed in 75 Civil 2362 & 2681)	
10-24-75	(15)	Filed affidavit of R.J. DE Fina Re: memorandum of law submitted by the Government Counsel <i>in opposition to consolidation</i>	
10-24-75	(16)	Filed plttf's memorandum of law in opposition to consolidation.	
11-06-75	(17)	Filed plttf's motion instanter based on newly discovered evidence, et	
11-26-75	(17)	Filed plttf's affdvt & notice of motion re: discovery argument, etc. (no date indicated) <i>Ret 12-05-75. D.F</i>	
01-30-76	(18)	Filed plttf's affidavit & notice of motion for an order requiring Magistrate Schreiber to report Re: withdrawal.	

Knappl

DATE	PROCEEDINGS	Date of Judgment
02-26-76	(19) Filed Memorandum & Order #43951: The Government's motion to consolidate five actions 75-1526, 75-1564, 75-2119- 75-2362 & 75-2681 is granted. Govt's motion to dismiss & ITT's motion to dismiss are treated as rule 56 motions for summary judgment. All FOIA claims in 75 Civ 2681 are dismissed for failure to exhaust administrative remedies. The complaints in 75 Civ 2362 & 2681 are dismissed as to deft. ITT for lack of diversity jurisdiction. Complaints in 75 Civ 2681 & 2362 are dismissed as to deft. Minogue, for failure to plead proper jurisdiction. Knapp, J. m/n	
03-01-76	(20) Filed pl'tff's affirmation & notice of motion to reconsider decision. ret. before Knapp, J.	
03-01-76	(21) Filed pl'tff's motion Re: minutes of hearing before Magistrate Schreiber, ret. before Knapp, J.	
03-01-76	== Filed Memo-endorsed on pl'tff's motion filed 1-30-76 #18, motion withdrawn as moot. Knapp, J.	
03-01-76	== Filed Memo-endorsed on pl'tff's motion filed 9-18-75, motion withdrawn as moot. Knapp, J. (Entered in 75 C. 2681)	
03-01-76	== Filed Memo-endorsed on pl'tff's motion filed 11-26-75, motion withdrawn as moot. Knapp, J.	
03-17-76	(21) Filed Memorandum & order #44076: Our Memorandum & order of 2-26-76 in 75 Civ 2681 marking the motion made by deft. ITT on behalf for a hearing on the question of whether Minogue was ever properly served withdrawn as moot- must be vacated. The return date of said motion shall be April 9, 1976, at 2: P.M. in Room 519. At that time, the court will conduct a brief hearing on the sole issue of whether Minogue was properly served. Knapp, J. m/n	
3-23-76	(22) Filed U.S.A. notice of motion for reargument of court's order dated 2-26-76, ret. 4-9-76.	
3-23-76	(23) Filed U.S.A. memorandum of law in support of motion for reargument ret. 4-9-76.	
3-22-76	(24) Filed pl'tff's notice of appeal to the U.S.C.A. from order rendered by Judge Knapp. Mailed copies to Robert B. Fiske, Jr & Joseph F. Onorato.	
4-02-76	(25) Filed pl'tff's affirmation & notice of motion to obtain D.E.A. report ret. 4-09-76.	
4-14-76	(26) Filed pl'tff's memorandum for pre-trial conference. (To chambers on 9-16)	
4-20-76	== Filed Memo-endorsed on Motion #25 filed 4-2-76 for reargument: Motion denied. So ordered. Knapp, J. m/n	
4-20-76	(27) Filed Memorandum & Order #44269: The Government is hereby directed to prepare a proposed judgment within 10 days. So ordered. Knapp, J.	
5-10-76	(28) Filed pl'tff's notice of motion to compel entering of judgment ret. before Knapp, J.	
5-14-76	(29) Filed pl'tff's objection to signing of Government's proposed judgment.	
5-17-76	(30) Filed True copy copy from the U.S.C.A. of stip & order that the appeal may be withdrawn without costs & without attys fees & without prejudice. So ordered. Clerk.	

Knapp

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DATE	PROCEEDINGS	I
05-20-76	<p>Filed JUDGMENT & ORDER that all Freedom of information act claims in this action are dismissed, all common law claims of libel, slander & defamation against the Federal deft's are dismissed. Complaints in 75 Civ 2362 & 75 Civ 2681 are dismissed as to deft. ITT Federal Laboratories & Mingoque. Federal deft's motion for judgment on the pleadings, treated as a motion for summary judgment is granted with respect to all remaining Freedom of information act claims except with respect to the aforementioned DEA report of investigation which has been disclosed to plttf's in redacted form as directed by the court, each of the complaints is dismissed with prejudice & without costs. Knapp, J. Judgment Ent. Clerk.</p> <p style="text-align: center;">m/n</p> <p style="text-align: right;">Ent. 5-25-76.</p>	Ju
06-07-76	<p>Filed plttf's notice of appeal to the USCA from final judgment entered on 5-25-76. Mailed copies to Robert T. Fiske, Jr & J.F. Onorato.</p>	
06-28-76	(31) Filed plttf's affirmation & notice of motion to file copies of lost filed documents ret. 7-2-76.	
06-28-76	(32) Filed plttf's copy of papers missing & copy of letter of 8-30-75 to complete record on appeal.	
	#29-plttf's objections to signing of Government's proposed judgment.	
	#28-Motion instant May 10, 1976 to compel entering of judgment Docket No. 75Civ 1564. Order to file copy of certified letter sent by certified mail to Judge Knapp on August 30, 1975 & at present in file 75 Civ 1564.	
7-01-76	---Filed Memo-endorsed on plttf's motion filed 6-28-76 #31: Motion granted. The Clerk is directed to enter the documents annexed to plttf's statement which is marked Exhibit 1, to this motion. So ordered. Knapp, J.	
7-01-76	---Filed Memo-Endorsed on plttf's motion filed 6-28-76 #32: This statement is marked Exhibit 1 to plttf's motion filed 6-28-76. So ordered. Knapp, J.	

DIST/OFFICE	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	O	R	I	23	DEMAND	OTHER	JA 6	JURY	DEM.	YR.
208-1	75	1564	03	31	75	2	390	1						0855	P		75

08-06-75 ACTION CONSOLIDATED WITH 75-15266
 DE FINA RICHARD, J. Pro Se (CIVIL DEPT)
 75 Civ. 1526)

DEFENDANTS Knapp
 Virginia H. Anderson, et al
 U.S. CIVIL SERVICE COMMISSION

2-26-76-Actions 75-2362, 75-2681 consolidated with above actions.
 (See preceding page for caption title)

(See additional listing for all deft's)

(RELATED CASE -75 Civ 1526)

CAUSE

Veterans preference Act. Civil Rights & freedom of information act.

ATTORNEYS

Ricahrd J. DeFina -Pro Se
 220-31 Union Turnpike
 Flushing, New York 11364

AUSA Garber
 U.S. Atty, 791-1946

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	MAR 31 1975	RECEIPT NUMBER		PAID
				155
				156

UNITED STATES DISTRICT COURT DISTRICT

208-1	75	1564	03-31-75	2	890	1				0855	P	75	1564
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PLAINTIFFS
 03-06-75 Action consolidated with 75-15266
~~75-2119 FOR ALL PURPOSES.~~
 DE FINA RICHARD, J.

Pro Se (CARRY UNDER
 75 Civ. 1526)

DEFENDANTS Knapp, J
 Virginia M. Armstrong, as direc
 U.S. CIVIL SERVICE COMMISSION
 etal

(See preceeding page for correct
 title)

(See additional listing for all deft's)

(RELATED CASE -75 Civ 1526)

CAUSE

Veterans preference Act. Civil Rights & freedom of information act.

ATTORNEYS

Ricahrd J. DeFina -Pro Se
 220-31 Union Turnpike
 Flushing, New York 11364

AUSA Gerber
 U.S. Atty , 791-1946

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		RECEIPT NUMBER		CARD DATE MAIL	
		C D NUMBER		JS-5	
				JS-6	

75 Civ 1564 DePina

vs. U.S. Civil Service Commission

75 Civ

DATE	NR.	PROCEEDINGS
03-31-75	(1)	Filed complaint & issued summons.
04-16-75	(2)	Filed Summons with Affidvt of service upon U.S. Civil Service Commission by Paul T. Troia upon U.S. Atty. & Service by Certified Mail 7101253 upon Atty Gen. Wash D.C. 4/2/75
05-08-75	(3)	Filed stip & order that time for deft. to answer is ext. from 5-2-75 to 6-2-75. Knapp, J.
05-15-75	(4)	Filed plttf's affidavit & notice of motion to amend complaint & add deft's ret. 5-30-75.
05-23-75	---	Filed memo-endorsed on document #4-Plttf's motion filed 5-15-75 to amend complaint: Motion denied, without prejudice, as unnecessary as to deft. has not yet filed its answer. The clerk of the court is directed to file the proposed amended complaint attached hereto as plttf's new amended complaint. So ordered. Knapp, J. m/n
05-27-75	(5)	Filed proposed amended complaint.
05-29-75	(6)	Filed Amended complaint.
06-10-75	(7)	Filed plttf's affidavit & notice of motion for undeleted copies ret. 6-20-75.
06-10-75	(8)	Filed ANSWER of defts. US Atty
06-20-75	(9)	Filed Amended Summons with Marshal's Returns. Served: Robert J. Drummond, Pers. Invest. Wash, D.C. by Certified mail #162808 ✓ Frank V. Monastero by Carol Haxanko, 6/9/75 Felice Pope by Miss E. Dunham, 6/5/75 Virginia Armstrong by Joanne S. William, 5/30/75 Edward M. Levi, Atty Gen. Wash, D.C. by Certified Mail #162809 & ✓ U.S. Atty Gen. Wash, D.C. " " 162810
06-26-75	(10)	Filed affidavit of H.L. Gerber in opposition to plttf's motion.
07-02-75	---	Filed Memo-endorsed on plttf's motion filed 6-10-75 #7: Motion denied because it seeks the ultimate relief requested & there has been no showing of irreparable damage on condition that deft. add themselves promptly to the merits of the action. Knapp, J. m/n
07-25-75	(11)	Filed plttf's Affirmation & notice of motion to reconsider decision to send this action to another judge ret. 7-31-75. (Filed & set in 75 Civ 1526).
08-06-75	(12)	Docketed memo and, on motion of 7/25/75-Docket #11, Court having already decided to accept transfer of 75 Civ. 2119 to the Court of the AUSA having consented to consolidation of 75 Civ. 1526, 2119 are hereby consolidated. So ordered. Knapp, J. (Filed in 75 Civ 1526 (also docketed in 75 Civ. 2119. (m/n)
02-26-76		Filed Memorandum & order #13951: The Government's motion to consolidate five actions 75-1526, 75-1564, 75-2119, 75-2362 & 75-2681 is granted. Govt's motion to dismiss & ITT's motion to dismiss are treated as rule 56 motions for summary judgment. All FOIA claims in 75 Civ 2681 are dismissed for failure to exhaust administrative remedies. The complaints in 75 Civ 2362 & 2681 are dismissed as to deft. ITT for lack of diversity jurisdiction. Complaints in 75 Civ 2681 & 2362 are dismissed as to deft. Minn. for failure to plead proper jurisdiction. Knapp, J. m/n
03-17-76		Filed Memorandum & order #14041: A summary judgment & order of 2-26-76 in 75 Civ 2681-making the motion made by deft. ITT on behalf of Minn. for a hearing on question whether Minogue was even properly served withdrawn as moot & to be vacated. The return date of motion shall be April 9, 1976 at 2:00 P.M. in Room 519. At that time the court will conduct a brief hearing on the sole issue of whether Minogue was properly served. Knapp, J. m/n

D. C. 110 Rev. Civil Docket Continuation

Page #2

DATE	PROCEEDINGS
(13)	
04-08-76	Filed pl'tff's reply to Government motion re: 4-2-75 order of judgment of law.
05-20-76	Filed JUDGMENT & ORDER that all Freedom of Information Act claims in this action are dismissed, all counts of libel, slander & defamation against the Federal deft's are dismissed. Complaint in 75 Civ 2362 & 75 Civ 2681 are dismissed as to deft. ITT Federal Laboratories & Binogue. Federal deft's motion for judgment on the pleadings, treated as a motion for summary judgment is granted with respect to all remaining Freedom of Information Act claims except with respect to the aforementioned DEB report & investigation which has been disclosed to pl'tff's in redacted as directed by the court, each of the complaints is dismissed prejudice & without costs. Knapp, J. Judgment Ent. Clerk.
06-23-76	n/n
06-28-76	Filed pl'tff's motion for notice of motion to file copies of lost & destroyed documents. Ret. 7-2-76. (Filed under Nov 75 C. 1526.)
06-28-76	Filed pl'tff's copy of papers missing & copy of letter of 8-30-75 to complete record on appeal.
07-01-76	Order to file copy of certified letter sent by certified mail to Judge Knapp on 8-30-75.
07-01-76	Filed Memo-endorsed on pl'tff's motion filed 6-28-76 filed under 75 Civ 1526 #31: Motion granted. The Clerk is directed to enter documents annexed to pl'tff's statement which is marked Exhibit to this motion. So ordered. Knapp, J.
07-01-76	Filed Memo-endorsed on pl'tff's motion filed 6-28-76 filed under 75 Civ 1526 #32: This statement is marked Exhibit 1 to pl'tff's motion filed 6-28-76. So ordered. Knapp, J.
07-01-76	Filed Letter from Madeline M. Defina, attorney to Judge Knapp dated August 30, 1975.

IST OFFICE	NUMBER	MO. DAY YEAR	J	N/S	O	R	23	S	R	NUMBER	DEM.	JA	10
208-1	75 2119	05 05 75	2	890	1					0855	P	75	2119

PLAINTIFFS

DEFENDANTS

DE FINA, RICHARD J.

KELLY, CLARENCE M. - individually and as Director of the Federal Bureau of Investigation
 BARRY, "JOHN"
 HENRY, "JOE" individually and as Sepcial Agents of the Federal Bureau of Investigation whose true first names are presently unknown
 MARY DOE #1
 MARY DOE #2 accusers, whose true names are presently unknown,
 JOE DOE, individually and as Assistant United States Attorney mentioned in Ex A, whose true name is presently unknown.

CAUSE

Complaint with request for injunctive and mandamus relief.

ATTORNEYS

Richard J. De Fina Pro Se
 220-31 Union Tpke
 Flushing, N.Y. 11364
 tele: 479- 1555

U.S. Attorney
 791-1946
 NATHANIEL L. GERBER
 ASST. U.S. ATTY.
 U.S. Courthouse Annex
 One St. Andrew's Plaza
 New York, N.Y. 10007

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STATISTICAL CARDS

DATE
 MAY 5 1975

RECEIPT NUMBER

C.D. NUMBER

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DATE MAILED

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JS5

JS6

73-2119 Judge Knapp

Richard S. DeFina vs- Clarence N. Kelly, etc. et.al.

DATE	NR.	PROCEEDINGS
05-05-75	(1)	Filed complaint and issued summons.
5-12-75	(2)	Filed summons & entered marshal's return served on: Clarence Kelly by U.S. Atty.'s Office (R. Lee) 5-6-75 and certified mail receipt 285026 and 285025 on Atty. Gen'l. and Clarence Kelly Dept. of Justice F.B.I.
06-11-75	(3)	Filed Order that time for deft's to answer with respect to complaint is set from 6-5-75 to 7-7-75, ordered that a copy of this order be served by atty. for deft's upon the pro se atty. by certified mail. So ordered. Knapp, J.
06-12-75	(4)	Filed Affidvt of Mailing by Pauline Troia, U.S. Atty's office of copy of order of Knapp, J. on 6/11/75 by mail Certified #130410.
07-08-75	(5)	Filed ANSWER to complaint by U.S. USA.
05-28-75		Reassignment from JUDGE KNAPP to JUDGE BRIANT.
08-06-75		Order Memo End. on motion of 7/25/75 Document 11, court having already agreed to accept transfer of 75 Civ. 2119 to its docket with the AUSA. The court consented to consolidation of 75 Civ. 1526, 1564, 2119, motion is hereby granted and 75 Civ. 1526, 1564 and 2119 are hereby consolidated. So ordered. Knapp, J. (Filed in 75 Civ. 1526) (also docketed in 75 Civ. 1564) (wr)
11-08-75	(6)	Filed plttf's motion instantner based on newly discovered evidence.
02-26-76	==	Filed Memorandum & order #43951: The Government's motion to consolidate five actions 75-1526, 75-1564, 75-2119, 75-2362 & 75-2681 is granted. Govt's motion to dismiss & ITT's motion to dismiss are treated as rule 56 motions for summary judgment. All FOIA claims in 75 Civ 2681 are dismissed for failure to exhaust administrative remedies. The complaints in 75 Civ 2362 & 2681 are dismissed as to deft. ITT for lack of diversity jurisdiction. Complaints in 75 Civ 2681 & 2362 are dismissed as to deft. Minogue for failure to plead proper jurisdiction. Knapp, J. m/n
03-17-76	==	Filed Memorandum & Order #44076. Our memorandum & order of 2-26-76 in 75 Civ 2681-marking the motion made by deft. ITT on behalf of Minogue for a hearing on the question of whether Minogue was ever properly served withdrawn as moot-must be vacated. The return date of said motion shall be April 9, 1976, at 2: P.M. in room 519. At that time, the court will conduct a brief hearing on the sole issue of whether Minogue was properly served. Knapp, J. m/n
4-21-76	(7)	Filed Plttf's notice of motion to change "withdrawn as Moot" on all motions to enable plttf. to appeal. ret. before Knapp, J.
4-26-76	==	Filed Memo-endorsed on plttf's motion filed 4-21-76 to change Withdrawn as moot: This application is granted to the extent that any prior motions heretofore marked "withdrawn as moot" are hereby marked "dismissed as moot". So ordered. Knapp, J. m/n
05-20-76		Filed JUDGMENT & ORDER that all Freedom of information act claims in this action are dismissed, all common law claims of libel, slander & defamation against the Federal deft's are dismissed. Complaints in 75 Civ 2362 & 75 Civ 2681 are dismissed as to deft. ITT Federal Laboratories & Minogue. Federal deft's motion for judgment on the pleadings, treated as a motion for summary judgment is granted with respect to all remaining Freedom of information act claims except with respect to the aforementioned DEA report of investigation which has been disclosed to plttf's in redacted form as directed by the court, each of the complaints is dismissed with prejudice & without costs. Knapp, J. Judgment Ent. Clerk. m/n
		Ent. 5-25-76.

OFFICE	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	R	"	23	DEMAND	OTHER	JUDGE	JURY	DOCKET
203-1	75	2362	05	19	75	3	320				1,000.		9549	DEM.	75 2362
													9549		75 2362

PLAINTIFFS

De Fina, Richard

DEFENDANTS

WILLIAMS, MITCHELL

WILLIAMS, MITCHELL - individually and as Chief Division of Reimbursable Investigations, U.S. Civil Service Commission, ITT FEDERAL LABORATORIES A DIVISION OF INTERNATIONAL TELEPHONE AND TELEGRAPH CORP.,
 MINOGUE THOMAS J. individually and as employee of ITT FEDERAL LABORATORIES, "GEORGE DOE" and "JOHN DOE" whose true names are presently unknown

02-26-76-This action consolidated with 75-1564, 2119,2681 & carry under 75-1526

CAUSE

mw

Injunctive and mandamus relief

ATTORNEYS

Pro se

DE FINA, MADEIRA E.
 220-31 Union Turnpike
 Flushing, N.Y. 11364
 32 2-1555

DEFT. MITCHELL WILLIAMS
 Asst. U.S. Atty N. L. Gerber
 1 St Andrews Plaza NYC 791-1946

Deft. ITT Fed. Labs.
 Joseph P. Onorato Esq.
 1633 Bway, NYC 10019-
 489-7500

Hanner, Onorato & Hogarty (deft. T.J. Min
 1633 Broadway, N.Y.C. 10019-489-7500

FILING FEES PAID

RECEIPT NUMBER

C.D. NUMBER

STATISTICAL CARDS

CARD X DATE MAILED

MAY 20 1975

5/16/75

155

75 CIV 23-62

DATE	NR.	PROCEEDINGS
05-19-75	1	Filed complt and issued summons.
5-30-75	2	Filed Summons with Marshall's return. Served; U.S. Civ. Serv. Comm by Certified Mail Recpt. #162798 dated 5-22-75 Atty Gen Wash D.C. " " " " #162799 " " " " ITT Fed. Labs. " " " " #162800 " " " " U.S. Atty off. St. Andrews Plaza by. P. Troya " " " "
6-30-75	3	Filed Pltff's Notice of Cross Motion and Reply to motion to amend Complt.....ret. 7-2-75 at 10Am.
7-3-75	1	Filed Order that the time for deft. R. Williams to answer the complt is ext to 7-23-and that a copy of this order be served by atty for deft. R. Williams, upon the pro se pltff. R. J. De Fina, by certified mail....Lasher, J. mn
7-8-75	5	Filed defts' ^{1st} Internat'l Telephone & Telegraph Corp. motion for a more definite statement....ret. July 9, 1975
7-8-75	6	Filed defts. memorandum in support of motion for a more definite statement
7-24-75	7	Filed Deft. Ritchey Williams's Answer.
8-1-75	8	Filed Pltff's Affirmation for order to Clerk to file an amended complt. USA
8-8-75	9	Filed USA'S AMENDED ANSWER. USA
9-17-75	10	Filed Amended Complt. with request for Injunctive and Mandamus relief....Jury demand.
9-22-75	11	Filed Memo End on back of Motion fld. 7-8-75. ..Motion granted and the Clerk is directed to accept for filing the attached Amended complt...So Ordered...Knapp, J
9-23-75	12	Filed Deft. ITT Fed. Labs's Answer to amended complt. JFO
9-24-75		CASE REASSIGNED TO JUDGE KNAPP.
10-02-75	13	Filed pltff's amended complaint with request for injunctive and mandamus relief & " request for jury. <i>10-24-75</i>
09-30-75	14	Filed summons with amended complaint & marshals return: Served, Thomas J. Minogue, personally on 9-22-75.
10-08-75	(15)	Filed Govt.'s notice of motion re: consolidate 75 Civil 1526, 1564, 2119, 2362 & 2681 and as consolidated for an order dismissing the complaints. (orig. papers filed in 75 Civil 1526) motion ret: 10-24-75.
10-08-75	(16)	Filed Govt.'s memo. of law re: support of motion to consolidate and dismiss, etc. (orig. filed in 75 Civil 1526)
09-22-75	(17)	Filed Memo End. on document #3. Motion granted and Clk directed to accept for filing attached Amended Complaint. So Ordered. Knapp, (mn)
10-16-75	(17)	Filed deft's ITT Fed. Labs. ANSWER to amended complaint. <i>Do not use #12 J.F.O.</i>
10-15-75	(18)	Filed ANSWER to amended complaint by deft. Thomas J. Minogue. H, O&H
10-29-75	(19)	Filed deft's ITT Federal Lab. & Thomas J. Minogue affidavit & notice of motion permitting them to serve an amended answer ret. 11-7-75.
11-06-75	(20)	Filed pltff's brief in opposition to consolidate & dismiss.
11-06-75	(21)	Filed affidavit of R.J. DeFina in opposition to consolidate action 75 Civ 2681 with this action.

Cont'd on page #2

DATE	PROCEEDINGS
	Page 2
03-16-76	Filed Memorandum & order #13951: The Government's motion to consolidate five actions 75-1526, 75-1564, 75-2119, 75-2362 & 75-2681 is granted. Govt's motion to dismiss & ITT's motion to dismiss are treated as rule 56 motions for summary judgment. All FOIA claims in 75 Civ 2681 are dismissed for failure to exhaust administrative remedies. The complaints in 75 Civ 2362 & 2681 dismissed as to deft. ITT for lack of diversity jurisdiction. Complaints in 75 Civ 2681 & 2362 are dismissed as to deft. Minogue for failure to plead proper jurisdiction. Knapp, J. m/n
03-17-76	Filed Memorandum & order #44076: Our Memorandum & order of 2-26-76 in 75 Civ 2681-marking the motion made by deft. ITT on behalf of Minogue for a hearing on the question of whether Minogue was ever properly served withdrawn as moot- must be vacated. The ret. date of said motion shall be April 9, 1976, at 2: P.M. in Room 519. At that time, the court will conduct a brief hearing on the sole issue of whether Minogue was properly served. Knapp, J.
2204-15-76	Filed affirmation by S.I. Goldberg.
2304-15-76	Filed affirmation by S.I. Goldberg.
04-20-76	Filed Memorandum & order #44253: Minogue filed an answer in this case, he specifically raised the affirmative defense of lack of personal jurisdiction. We must dismiss the complaint as to him. So ordered. Knapp, J. m/n (Filed under 75 Civ 2681)
05-26-76	Filed JUDGMENT & ORDER that all Freedom of information act claims in this action are dismissed, all common law claims of libel, slander & defamation against the federal deft's are dismissed. Complaints in 75 Civ 2362 & 75 Civ 2681 are dismissed as to deft. ITT Federal Laboratories & Minogue. Federal deft's motion for judgment on the pleadings, treated as a motion for summary judgment is granted with respect to all remaining Freedom of information act claims except with respect to the aforementioned DSA report of investigation which has been disclosed to plaintiff's in redacted as directed by the court, each of the complaints is dismissed prejudice & without costs. Knapp, J. Judgment Ent. Clerk. m/n Ent. 5-25-76
06-23-76	(24) Filed plaintiff's affirmation & notice of motion to file true copies of pleadings, etc. lost by the court ret. 7-2-76.
06-25-76	Filed copies of papers to be filed in place of those missing. #2 Marshal returns on deft's served by certified mail. #14 Copy of filed summons with amended complaint & Marshal's return. Served Thomas J. Minogue personally on 9-22-75. #13 Copy of filed answer to amended complaint by deft. Thomas J. Minogue 10-15-75. #19 Copy of deft's ITT & Minogue's affidavit & notice of motion permitting them to serve an amended answer ret. 11-7-75.
07-01-76	Filed Memo-ordered on plaintiff's motion filed 6-23-76 #14 motion granted. The clerk is directed to enter the documents annexed to plaintiff's statement which is marked exhibit A to this motion including the miscellaneous correspondence attached & ordered. Knapp, J.

75 Civ 2302 Richard J. De Fine

vs. Ritchey, et al.

75 Civ 2362

DATE:

PROCEEDINGS

Page #3

07-01-76 ==filed Memo endorsed on plaintiff's motion filed 6-23-76 #25. This statement is marked Exhibit A to plaintiff's motion of 6-23-76. So ordered. Knapp J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x
RICHARD J. DE FINA, :
Plaintiff, :
- against - : 75 Civ. 1526

FEDERAL AVIATION ADMINISTRATION, :
et al., :
Defendants. :

----- -x
RICHARD J. DE FINA, :
Plaintiff, :
- against - : 75 Civ. 1564

VIRGINIA M. ARMSTRONG, et al., :
Defendants. :

----- -x MEMORANDUM AND ORDER

RICHARD J. DE FINA, : #43951
Plaintiff, :
- against - : 75 Civ. 2119

CLARENCE M. KELLEY, et al., :
Defendant. :

----- -x
RICHARD J. DE FINA, :
Plaintiff, :
- against - : 75 Civ. 2362

RITCHEY WILLIAMS, et al., :
Defendants. :

----- -x
~~MADLINE DE FINA, :
Plaintiff, :
- against - : 75 Civ. 2681~~

~~ROBERT J. DRUMMOND, et al., :
Defendant. :
NOT APPEALING~~

----- -x

KNAPP, D.J.

Plaintiffs, Richard and Madeline DeFina, instituted these five Freedom of Information Act ("FOIA" or the "Act") and common law libel actions against various federal agencies^{1/} and a private company (ITT Federal Laboratories), as well as numerous officials and employees of same. The essential claims made in each action are two-fold: (1) that defendants have circulated false and slanderous information regarding plaintiffs, and (2) that the publication of this information, allegedly maintained in files kept by the respective organizations, has caused plaintiffs great anguish and, in particular, has prevented plaintiff Richard DeFina from obtaining employment. For relief, plaintiffs seek disclosure of the alleged files without any deletions, an injunction against further publication of the material allegedly contained therein and compensatory damages in the total amount of \$4,700,000.

The government has moved for an order consolidating the five actions, and as consolidated, for a further order dismissing the complaints on the ground that they fail to state a claim upon which relief can be granted and for lack of jurisdiction. Defendant ITT has also moved to amend its answer to include the affirmative defense of lack of jurisdiction and to dismiss the two actions in which it is a named defendant (75 Civ. 2362 and 2681) for lack of diversity jurisdiction. Since all five actions involve numerous

common questions of law and fact, relating to the applicability of various exemptions under the Act, the motion to consolidate is granted. F.R.C.P. 42(a). In addition, since all sides have submitted voluminous affidavits, the motions to dismiss shall, in accordance with the provisions of Rule 12(b), be treated as if for summary judgment. As such, they are disposed of as indicated below.

The genesis of 75 Civ. 1526, 1564 and 2362 was Richard DeFina's non-selection for various civil service positions, some of which were of a sensitive nature, for which he had made application. These positions involved employment as a Customs Security Officer with the Bureau of Customs, a radio operator with the then existing Bureau of Narcotics and Dangerous Drugs (predecessor of Drug Enforcement Administration - "DEA"), and an electronics technician with the Federal Aviation Administration ("FAA").^{2/} As required by law, each of the respective agencies and the Civil Service Commission conducted preliminary and full field background investigations of Mr. DeFina in order to ascertain his suitability and eligibility for the position in question. In connection with these investigations, Mr. DeFina's former employers and co-employees as well as social acquaintances were contacted for their assessment of his fitness for the job. In addition, information was gathered from credit bureaus, and law enforcement and investigative agencies, including the FBI. In each instance, Mr. DeFina's application was rejected on such grounds as poor eyesight,

instability of work habits and poor employment record. As a result, plaintiffs have concluded that they are the victims of a nefarious conspiracy on the part of the named defendants as well as various unidentified persons to deprive them of their right to employment and various civil rights by resorting to a "wrong, false and malicious libel" of their character and reputation. In an effort to expose this alleged "conspiracy", plaintiffs seek, pursuant to the FOIA, 5 U.S.C. §552, unexpurgated copies of the investigative files maintained by the aforementioned agencies pertaining to both Mr. and Ms. DeFina.

With respect to 75 Civ. 2119, the underlying facts are somewhat different. Apparently Madeline DeFina - an attorney in her own right - had been the subject of an inquiry by a Grievance Committee of the U.S. Court of Military Appeals which led to her disbarment from that Court on February 17, 1960. Richard DeFina allegedly made a threatening phone call to the Court in connection with the inquiry, which gave rise to an FBI investigation of both Richard and Madeline DeFina. Although both persons admitted making long distance calls to the Court, they denied making any threats. At the conclusion of the investigation, it was determined that prosecution of Mr. DeFina was not warranted and the investigation was terminated.

In February, 1975, Mr. DeFina - through his counsel

Ms. DeFina - filed a FOIA request with the New York Regional Office of the Civil Service Commission ("CSC") for any and all files maintained by it on him. The CSC released a complete copy of its file on Richard DeFina, including the FAA's statement of reasons (called an "Objection") for its decision not to hire him and all Certificates of Eligibles in which Mr. DeFina had been included. The only deletions were of the names of other persons on the respective Certificates as well as the names of Mr. DeFina's former employers whose responses to the employment inquiries of the FAA were cited in the Objection. In addition, the names of two FAA employees whose evaluation of telephone conversations with Mr. DeFina were cited in the Objection were similarly deleted.

Mr. DeFina appealed the decision regarding his FOIA request, as a result of which CSC released an edited copy of his investigative file which included the following:

Request to conduct Full Field investigation
dated 7-10-73

Report of National Agency Check dated
10/11/73

4 CSC Reports of Investigation (1973)

Request to conduct Full Field investigation
dated 1-13-71

Request to cancel Full Field investigation
dated 2-10-71

Report of National Agency Check dated
2-22-71

6 CSC Reports of Investigation (1971)

Again, the names and other identifying characteristics of those persons who had been interviewed by CSC investigators were deleted, as well as certain intra-agency evaluative and transmittal memoranda written by CSC investigators in the course of their investigations. These internal memoranda did not constitute part of the final report submitted to the requesting agency (i.e., Bureau of Customs; FAA) and any factual material contained therein was simply duplicative of the information contained in those reports which were released.

The file as released also contained the FBI memorandum prepared in connection with its investigation of the allegedly threatening phone calls. The only deletions made therein were of the identities of individuals other than Mr. DeFina named in the report.

Madeline DeFina made an independent FOIA request to the CSC in her own behalf in August, 1975. In response thereto, the CSC released three documents (dated in or around January 1971), which had been contained in Richard DeFina's investigative file. Ms. DeFina's failure to appeal the CSC determination precludes her now from asserting any rights of judicial review under the Act. Her FOIA claims in 75 Civ. 2681 are, accordingly, dismissed for failure to exhaust administrative remedies. 5 C.F.R. §294.105(b). McKart v.

U.S. (1969) 395 U.S. 185.

Mr. DeFina also served FOIA requests on the FAA, DEA and the VA, which requests were complied with, with the following exceptions:

<u>Agency</u>	<u>Released</u>	<u>Did Not Release</u>
FAA	1) Two Interview Records	medical records compiled by VA - later released by the VA
	2) Three Medical Releases signed by Mr. DeFina)	
	3) Copy of Telegram to the VA of January 13, 1975 requesting Mr. DeFina's medical record.	
	4) Copy of VA letter of March 10, 1975 advising that Mr. DeFina had withdrawn his medical authorization.	
	5) evaluations of Mr. DeFina by former employers	names of former employers
DEA	1) Plaintiff's Personal Qualifications Statement filed with the CSC on September 6, 1972;	various internal evaluative and transmittal memoranda, including file notations of telephone conversations between DEA personnel and Mr. and Ms. DeFina
	2) Correspondence between the BNDD and Mr. DeFina or Ms. DeFina.	
	3) Mr. DeFina's "Security Investigations Data For Sensitive Position" application filed with the BNDD on March 19, 1973;	Report of Investigation evaluating results of agency's background investigation of Mr. DeFina
	4) Recommendations submitted by Mr. DeFina's acquaintances and former employers and academic instructors in connection of his application for employment; and	
		names of DEA personnel in agency's correspondence with Congressman Rosenthal

- 5) Correspondence between the BNDD and Congressman Benjamin S. Rosenthal regarding Mr. DeFina's application for employment.

VA

- 1) Copies of all communications with and from the FAA re Mr. DeFina.

- 2) Plaintiff's medical records.

With respect to the initial determinations of both the FAA and DEA, Mr. DeFina pursued an administrative appeal. No appeal was taken with respect to the VA records, apparently because plaintiff was satisfied with that agency's response to his FOIA request.

The above rather detailed account of what has transpired to date is necessary for an understanding of the issues now before us on the government's motion to dismiss. As a preliminary matter, the only claims of any merit in these five actions are those asserted under the FOIA for disclosure of information.^{3/} (As to these, see below). Plaintiffs' additional claims of libel and malicious defamation - asserted against federal agencies and officials and employees thereof acting in their official capacities - are barred by the doctrine of sovereign immunity and the Federal Tort Claims Act, 28 U.S.C. §2671, 2680(h) which specifically bars any claim against such defendants "arising out of libel, slander . . . [etc.]". Finally, with respect to the claims asserted against the defendant ITT, there is no proffered

ground for jurisdiction, save diversity - which ground is untenable in light of the undisputed fact that ITT's principal place of business is New York, the state of residence of the plaintiffs as well. Accordingly, the complaints in 75 Civ. 2362 and 2681 as against ITT are dismissed for lack of subject matter jurisdiction. Moreover, since the complaint in 75 Civ. 2681 alleges no facts to suggest that diversity of citizenship exists between plaintiffs and the individual defendant Thomas J. Minogue, that complaint is dismissed as to him.

We are left, therefore with the FOIA claims against the federal defendants in all five actions, in addition to the common law claim against Minogue in 75 Civ. 2362. Although the defendant Minogue has answered without raising any jurisdictional question, examination of the complaint discloses no facts to support a claim of diversity. The complaint is accordingly dismissed as to him sua sponte by the court.

The information which the defendants have refused to release, claiming that it falls under various exemptions recognized by the Act falls into three general categories:

- (1) the names and other identifying characteristics of persons outside the particular agency who cooperated in the background investigations of Mr. DeFina;
- (2) the names of agency employees connected with these investigations;

- (3) internal intra-agency memoranda of an evaluative and transmittal nature.

The government further claims a privilege with respect to the entire DEA Report of Investigation, on the ground that the identities of the persons named therein would be disclosed absent total deletion of its substantive contents and because of the "overall highly sensitive nature of its work". Finally, the CSC has deleted from the disclosed Certificates of Eligibles the names of all other persons thereon other than Mr. DeFina. No justification for this deletion has been offered, nor can we imagine any. The CSC is, accordingly, ordered to supply complete unexpurgated Certificates to plaintiff. As to the remaining deletions, the defendants rely on three of the nine statutory exemptions [5 U.S.C. §552(b)(5), (6) and (7)] and the general policy argument that the compelled disclosure of this remaining data would chill effective investigation of prospective government employees, particularly those being considered for sensitive positions. We reject this general argument at the outset. The principal objective of the FOIA is full agency disclosure "unless information is exempted under clearly delineated language". S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965), Environmental Protection Agency v. Mink (1973) 410 U.S. 73, 80. Unless the requested information falls within one of the Act's exemptions, it must be made available. NLRB v. Sears, Roebuck & Co. (1975) 421 U.S. 132, 136-7. Moreover, as explained by numerous courts, the specific exemptions are to be construed narrowly. Rose v.

Department of Air Force (2d Cir. 1974) 495 F.2d 261, Fisher v. Renegotiation Board (D.C. Cir. 1972) 473 F.2d 109, 112, Bristol-Myers Co. v. FTC (D.C. Cir.) 424 F.2d 935, 938, cert. den., 400 U.S. 824 (1970). Consequently, the defendants' justification for deleting identifying details can be sustained, if at all, only on the independent applicability of one or more statutory exemptions to the deletions in question. Mobil Oil Corporation v. FTC (S.D.N.Y. 1976) _____ F.Supp. _____ (Lasker, J. - January 12, 1976). (Sl. Opin. at 3).

Exemption 5

The defendants first rely on the provisions of 5 U.S.C. §552(b)(5) to justify their refusal to disclose, which exemption protects from disclosure:

"Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"

This exemption has consistently been interpreted to protect internal agency communications such as advice, recommendations, opinions or other material reflecting the deliberative or policy-making process within an agency, as opposed to purely factual or investigatory reports. Environmental Protection Agency v. Mink, supra, at 87-88; Brockway v. Dept. of Air Force (8th Cir. 1975) 518 F.2d 1184; Wu v. National Endowment For Humanities (5th Cir. 1972) 460 F.2d 1030, 1032, cert. den., 410 U.S. 926 (1973); Sterling Drug Inc. v. FTC (D.C. Cir.

1971) 450 F.2d 698, 705; Soucie v. David (D.C. Cir. 1971) 448 F.2d 1067, 1077. In determining the applicability of this exemption to the information here withheld, the Court must bear in mind both the purpose and goal of the FOIA and that of this specific exemption. These counter-balancing policies have been described as:

"(1) the dissemination of useful information to the public - both in order to satisfy the needs of individuals for the information and in order to instill a sense of responsibility in the agency that realizes it can no longer hide its mistakes - and (2) the protection from inhibition of the free flow of information and free discussion within the agency."

Brockway v. Department of the Air Force, supra, at 1193, quoting with approval from Note, The Freedom of Information Act and the Exemption for Intra-Agency Memoranda, 86 Harvard L. Rev. 1047, 1052-53 (1973). The defendants of course place especial emphasis on the second of these two policies, with which we must agree. The purpose of the withheld internal memoranda was to communicate evaluations and recommendations from agency investigators to various agency officials whose responsibility it was to approve or reject Mr. DeFina's employment applications. Any factual material contained therein having already been released, plaintiffs clearly are not entitled to the balance which is comprised of preliminary impressions, opinions and recommendations. Moreover, in each instance in which Mr. DeFina was rejected, he was given a statement of reasons for the agency decision (see Jensen affidavit, Ex. A and Objection and Statement of Reasons filed by the FAA

with the CSC and released to plaintiff by the CSC). Accordingly, Mr. DeFina has already received not only the factual material contained in his investigative files, but also the substance of any interim recommendations contained therein which were in fact adopted by the agency.

Similarly, plaintiff is not entitled to the names of those outside sources who were consulted by agency personnel and who gave their evaluations of Mr. DeFina's fitness for civil service employment. Wu v. Nat'l Endowment for Humanities, supra, at 1032; Souci v. David, supra, at 1078, n.4. Persons consulted for their opinion of an applicant's fitness for employment would be reluctant to come forward and be entirely frank if they knew their identity would be revealed to the applicant in question, particularly if their opinion of him were critical, as indeed the opinions gathered in Mr. DeFina's case certainly were. In light of the overwhelming public interest in maintaining quality personnel within the government service, particularly in sensitive positions such as the ones for which Mr. DeFina was considered, outside opinions which materially assist the government in assessing an applicant's employment fitness must be encouraged. If such opinions were disclosed, the fear of publicity might exert a future inhibitory effect on their candor, induced by the threat of harassment in retribution for their honesty and frankness. For the same reason, exemption 5 also protects the identities of

those government employees who participated in the background investigations of Mr. DeFina. They too are entitled to some protection from harassment or vexatious litigation. They - perhaps even more than outside consultants - should be permitted to freely perform their respective evaluative functions without fear that their candor will subject them to harassment by disgruntled civil service hopefuls.

Although our findings as to the applicability of exemption 5 disposes of the matter, we nevertheless have concluded that the matter is protected by exemption 6 as well.^{4/}

That leaves us with the disclosability of the DEA Report of Investigation, which poses the most potentially troublesome question raised by the instant motion. The defendants have refused to disclose it in its entirety, although they have turned over numerous other DEA-held documents. The government's claim of privilege with respect to this Report is twofold: (1) release of the Report would reveal the identities of those involved in the background investigation, and (2) the entire report is privileged as a staff summary and analysis of factual information whose purpose was to provide input into the agency's deliberative process. The Court is unable to evaluate these contentions - both of which are meritorious - without an opportunity to examine the Report in camera.

Consequently, the U.S. Attorney is directed to provide us with a true copy of same so that such a determination can be made.

Exemption 7

This exemption, as recently amended, protects from compelled disclosure:

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life of physical safety of law enforcement personnel . . ."

The defendants rely on this exemption to justify withholding (1) the names of and other identifying data concerning individuals other than Mr. DeFina named in the FBI memorandum prepared in connection with its extortion investigation of Mr. DeFina, and (2) the same identifying information concerning individuals within and without the respective agencies who were involved in the background employment investigations of Mr. DeFina. Since we have already found the latter protected under exemptions 5 and 6, we shall, out of a sense of economy, be brief here.

With respect to the FBI memorandum, there can be no dispute that it was an "investigatory record" compiled for "law enforcement" purposes, inasmuch as its purpose was to determine whether Mr. DeFina should be prosecuted for the allegedly threatening phone calls made to the Court of Military Appeals. In addition, the language of exemption 7(D) ("national security intelligence investigation") and the legislative history thereof^{5/} compels the conclusion that background security investigations like those conducted of Mr. DeFina also fall under the rubric "investigatory records". See also Koch v. Dept. of Justice (D.D.C. 1974) 376 F.Supp. 313, 315. As in Koch, the background investigations of Mr. DeFina were conducted because he had applied for certain government positions and they were similarly intended to determine whether he had engaged in criminal activity or was otherwise unfit for government service. Accordingly, the records resulting therefrom were, under the reasoning of Koch, investigatory records compiled for law enforcement purposes within the meaning of Exemption 7.

Exemption 7(C) protects records the disclosure of which would "constitute an unwarranted invasion of privacy". Having already determined that the disclosure of the identities of people involved in the investigations would be a "clearly unwarranted invasion of privacy" under Exemption 6 (see n. 4 above), certainly the less stringent test of 7(C) has been met. Moreover, this data is also

protected from disclosure by the provisions of 7(D), since the persons and/or companies who responded to the investigative inquiries concerning Mr. DeFina are "confidential sources" within the meaning of the Exemption. As explained in the legislative history:

The substitution of the term "confidential source" in Section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an expressed assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes - either civil or criminal in nature - the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information. However, where the records are compiled by a criminal law enforcement authority, all of the information furnished only by a confidential source may be withheld if the information was compiled in the course of a criminal investigation. In addition, where the records are compiled by an agency conducting a lawful national security intelligence investigation, all of the information furnished only by a confidential source may also be withheld. Personnel, regulatory and civil enforcement investigations are covered by the first clause authorizing withholding of information that would reveal the identity of a confidential source but are not encompassed by the second clause authorizing withholding of all confidential information under the specified circumstances. [Underlining added.] Conf. Rep. No. 93-1200, 93rd Cong., 2d Sess., 1974 U.S. Code Cong. & Admin. News. pp. 6291-6292.

IT IS HEREBY ORDERED THAT:

1. The motion to consolidate is granted.
2. The government's motion to dismiss and ITT's motion to dismiss are treated as Rule 56 motions for summary judgment.
3. All FOIA claims in 75 Civ. 2681 are dismissed for failure to exhaust administrative remedies.
4. All common law claims of libel, slander and defamation against the Federal defendants are dismissed. 28 U.S.C. §2680(h).
5. The complaints in 75 Civ. 2362 and 2681 are dismissed as to the defendant ITT for lack of diversity jurisdiction. ^{6/}
6. The complaints in 75 Civ. 2681 and 2362 are dismissed as to the defendant Minogue for failure to plead proper jurisdiction. ^{6/}
7. The defendant U.S. Civil Service Commission shall disclose unexpurgated Certificates of Eligibles to plaintiffs.
8. The government must turn over to the Court for in camera inspection the DEA Report.
9. The defendants correctly applied exemptions 5, 6 and 7 in withholding internal memoranda and the identities of persons inside and outside the respective agencies who supplied information and evaluations to the government.

Dated: New York, New York

February 23, 1976.

WHITMAN KNAPP

WHITMAN KNAPP, U.S.D.J.

FOOTNOTES

1/

Federal Aviation Administration, U.S. Civil Service Commission, Federal Bureau of Investigation, Drug Enforcement Administration and the Veterans Administration.

2/

Executive Order 10450, 3 C.F.R. 57-66 (1974).

3/

The only relief plaintiffs could hope to obtain on their FOIA claims is that of disclosure, and possibly the assessment of attorneys fees and costs. 5 U.S.C. §552(a)(4)(E). The statute does not permit of any other form of relief, such as damages.

4/

The disclosure of the names and other identifying data of those persons outside the respective agencies who offered opinions concerning Mr. DeFina is protected ^{against} by exemption 6, which protects "personnel, medical or similar files", the disclosure of which would constitute "a clearly unwarranted invasion of personal privacy". See Wine Hobby USA, Inc. v. U.S. Internal Revenue Serv. (3d Cir. 1974) 502 F.2d 133, 135-137 (names of persons filing form with Bureau of Alcohol, Tobacco and Firearms for purpose of being permitted to produce wine for home use without payment of tax held protected from disclosure to manufacturer of wine-making equipment which intended to use such information for private commercial exploitation). Disclosure of the identities of those people who volunteered their opinions to the government would clearly constitute an invasion of their privacy under the reasoning of this case and possibly subject them to vexatious litigation (as is entirely likely, judging from the numerous frivolous and hysterical allegations contained in these actions). Cf., Getman v. NLRB (D.C. Cir. 1971) 450 F.2d 670. Such opinions were given either under an express promise of confidentiality (e.g., the FAA employment inquiries) or under circumstances which warranted a presumption of confidentiality (Drummond affidavit, ¶9; Jensen affidavit, ¶10).

5/

"The term 'intelligence' in section 552(b)(7)(D) is intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such functions. **** Personnel, regulatory and civil enforcement

investigations are covered by the first clause authorizing withholding of information that would reveal the identity of a confidential source" Conf. Rep. No. 93-1200, 93rd Cong., 2d Sess., 1974 U.S. Code Cong. & Admin. News, pp. 6291-6292.

6/

This is of course without prejudice to any appropriate state court actions by the plaintiffs against these defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
RICHARD J. DE FINA,
Plaintiff, :
- against - : 75 Civ. 1526
FEDERAL AVIATION ADMINISTRATION, :
et al., :

Defendants. :
-----x
RICHARD J. DE FINA,
Plaintiff, :
- against - : 75 Civ. 1564
VIRGINIA M. ARMSTRONG, et al., :
Defendants. :

-----x
RICHARD J. DE FINA,
Plaintiff, :
- against - : 75 Civ. 2119
CLARENCE M. KELLEY, et al., :
Defendants. : MEMORANDUM AND ORDER

-----x
RICHARD J. DE FINA,
Plaintiff, :
- against - : 44076
RITCHEY WILLIAMS, et al., :
Defendants. : 75 Civ. 2362

-----x
~~MADLINE DE FINA,~~
~~Plaintiff, :~~
~~- against -~~ : 75 Civ. 2681
~~ROBERT J. DRUMMOND, et al., :~~ NOT APPEALING
~~Defendants. :~~

-----x

KNAPP, D.J.

The plaintiffs in the above-entitled actions have moved by Notice of Motion filed March 1, 1976 as far as we can determine, for the following relief:

1. that the Court file its Memorandum and Order dated February 23, 1976;

2. that the Court decide any and all motions pending before it;
3. that the Court reconsider its decision to dismiss the complaints in 75 Civ. 2362 and 2681 as against the defendant Minogue for failure to properly plead diversity jurisdiction.^{1/}

As to the first request, as a matter of courtesy, the Court mailed to all counsel a copy of its Memorandum and Order on the very day it was signed, but prior to filing it with the Clerk of the Court. The Opinion was actually filed on February 26, 1976. For purposes of appeal, however, the cases are not closed and will not be closed until a Final Order and Judgment are submitted by the government and signed by the Court.

With respect to the second request, on the same day that the Court filed its Memorandum and Order, it also endorsed all known open motions and marked them withdrawn as moot. In the event that any have been overlooked, they are also hereby deemed withdrawn as moot.

Finally, as to the third request, plaintiff's motion to reconsider is granted. It appearing from the record before us, more specifically an affidavit submitted by the defendant Thomas J. Minogue, that said defendant is in fact - and was at the time of the filing of the complaints - a citizen and resident of California, that portion of our Memorandum and Order dated February 23, 1975 which dismisses the complaints as to said defendant on jurisdictional grounds is hereby

1/ Plaintiffs also seem to ask that we reconsider our decision of February 23, 1976 in its entirety. This we decline to do.

vacated. Although the complaints are facially defective for failure properly to allege the citizenship and residence of defendant Minogue, the whole record may be referred to for the purpose of curing such defective averment. Moore's Federal Practice, Vol. 2A, at 1662-1663. If diversity does in fact exist, the jurisdiction of this court is not defeated by the failure properly to allege it. Sun Printing & Publishing Co. v. Edwards (1904) 194 U.S. 377.

Consequently, our Memorandum and Order of February 26, 1976 in 75 Civ. 2681 - marking the motion made by defendant ITT on behalf of Minogue for a hearing on the question of whether Minogue was ever properly served withdrawn as moot - must be vacated. The return date of said motion shall be April 9, 1976, at 2:00 P.M. in Room 519. At that time, the Court will conduct a brief hearing on the sole issue of whether Minogue was properly served.

SO ORDERED.

Dated: New York, New York

March 15, 1976

WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
MADELINE DE FINA, :

Plaintiff, :

- against - :

75-Civ.-2681

ROBERT J. DRUMMOND, JR., Director of :
United States Civil Service Commission, :
Bureau of Personnel Investigations, :
ITT FEDERAL LABORATORIES, a division of :
International Telephone and Telegraph :
Corp. and THOMAS J. MINOGUE, :

Defendants. :
-----x

NOT APPEALING
←

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER

#44268

-----x
RICHARD J. DE FINA, :

Plaintiff, :

- against - :

RITCHEY WILLIAMS, individually and as :
Chief, Division of Reimbursable :
Investigations, U. S. Civil Service :
Commission, ITT FEDERAL LABORATORIES, :
a Division of International Telephone :
and Telegraph Corp., THOMAS J. MINOGUE, :
individually and as employee of ITT :
Federal Laboratories, "GEORGE DOE" :
and "JOHN DOE" whose true names are :
presently unknown, :

75 Civ. 2362

Defendants. :
-----x

We have before us defendant Minogue's motion, filed February 18, 1976, for an order determining whether he was ever properly served and consequently whether this court has jurisdiction over him. After conducting a hearing and having read the affidavits and other papers submitted to date, we have determined that the above questions must be answered in the negative. The complaints as against Minogue in 75 Civ. 2681 and 75 Civ. 2362 are, accordingly, dismissed for lack of personal jurisdiction.

75 Civ. 2681

1/

Mingue has never formally appeared in 75 Civ. 2681, nor has he filed an Answer therein. In an affidavit signed by him and filed in support of the instant motion, he asserts that at all relevant times during the pendency of this lawsuit (and, indeed, for at least one year before) he has resided and remained exclusively in California. Consequently, he avers that he has never been personally served. 2/ The only "Proof of Service" filed by the U.S. Marshal in this case indicates that service upon Minogue - who is an employee of ITT - was allegedly effected by means of mailing a copy of the Summons and Complaint to ITT's office in Nutley, New Jersey. According to Minogue affidavit, he was transferred from the Nutley, New Jersey office approximately four years ago. Plaintiff has suggested no facts which would cast doubt on the accuracy of that affidavit.

The evidence before us thus demonstrating that Minogue was never personally served, we must dismiss the complaint. Moreover, we are constrained to note that Minogue could not in any event be properly served outside New York. Fed. R. Civ. Proc. 4. The only conceivable jurisdictional basis for service upon Minogue in California is New York's long-arm statute, which specifically exempts actions which sound in defamation. CPLR §302. There can be no doubt that, as to Minogue, this is such an action.

75 Civ. 2362

3/

The identical defect exists in this action as well. Although Minogue filed an Answer in this case, he specifically raised the affirmative defense of lack of personal jurisdiction. On the above reasoning, therefore, we must dismiss the complaint as to him in 75 Civ. 2362 as well.

SO ORDERED.

Dated: New York, New York

April 19, 1976.

WHITMAN KNAPP, U.S.D.J.

FOOTNOTES

1/

Although a number of papers have been filed in this action on behalf of both ITT and Minogue, we are persuaded that the inclusion of Minogue's name was inadvertent on the part of ITT's counsel who acts for both defendants. In support of this conclusion, we rely, inter alia, on the facts that (1) Minogue had not and has not yet filed an Answer, whereas ITT has, and (2) the relief requested in said papers (e.g., the 10/29/75 motion for leave to file an Amended Answer) could only apply to ITT.

2/

The particular "Proof of Service" relied upon by plaintiff in opposition to the instant motion was filed by the Marshal in 75 Civ. 2362, not 75 Civ. 2681. It indicates that Minogue was served personally in 75 Civ. 2362 in National City, California on September 22, 1975.

3/

All that is left of it - after our decision of February 23, 1976 - is the cause of action against Minogue.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x

RICHARD J. DE FINA,

:

Plaintiff,

:

MEMORANDUM AND ORDER

- against -

:

Consolidated Index No.
75 Civ. 1526

VIRGINIA M. ARMSTRONG, et al.,

:

#44269

Defendants.

:

----- -x

KNAPP, D.J.

The government has moved for reargument of the court's decision of February 23, 1976 to the extent that it directs the United States Civil Service Commission ("CSC") to disclose to plaintiff Richard DeFina unexpurgated Certificates of Eligibles wherein Mr. DeFina is listed. On its earlier motion for summary judgment, the government neglected to include in its memorandum of law any arguments addressed to the disclosability of such Certificates, although one of the 6 affidavits appended to its Notice of Motion did assert a claim of confidentiality.

On its present motion, the government has convinced us that disclosure of unexpurgated Certificates would constitute

"a clearly unwarranted invasion of . . . [the] privacy" of those people listed on the Certificates. 5 U.S.C. §552(b)(6), Wine Hobby USA, Inc. v. U.S. Internal Revenue Service (3d Cir. 1974) 502 F.2d 133. As noted by the court in Wine Hobby, "a man's home is his castle". Disclosure of the names and addresses of CSC eligibles might very possibly subject them to harassment. Moreover, CSC regulations explicitly provide that the information contained in Certificates is confidential and not available to the public. 5 C.F.R. §294.501(b). Accordingly, it is reasonable to conclude that CSC applicants registered with the CSC for employment consideration in the expectation that personal information supplied by them would remain confidential. Finally, we can discern^{*/} no public interest whatsoever that might be served by disclosure.

In light of our supplemental memorandum and order of even date in 75 Civ. 2681 and 2362, and our endorsement on Ms. DeFina's motion of April 2, 1976 in 75 Civ. 1526, these cases are now entirely disposed of: all FOIA claims in 75 Civ. 2681 have been dismissed (decision of February 23, 1976); all common law claims of libel, slander and defamation against the federal defendants have been dismissed (decision of February 23, 1976); the complaints in 75 Civ. 2681 and 75 Civ. 2362 have been dismissed as to the defendants ITT (decision of February 23, 1976), and Minogue (decision of April 19, 1976); summary judgment has been granted in favor of the government with respect to

*/ Moreover, plaintiff has failed to suggest any real benefit he might derive from the requested disclosure.

all remaining FOIA claims, except with respect to the DEA report, which has been disclosed to the plaintiffs in redacted form as directed by the court.

The government is hereby directed to prepare a Proposed Judgment within ten (10) days.

SO ORDERED.

Dated: New York, New York

April 19, 1976.

WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD J. DE FINA,

Plaintiff,

-against-

FEDERAL AVIATION ADMINISTRATION,
et. al.,

Defendants.

ORDER AND JUDGMENT

:(Consolidated Index
Co.)

: 75 Civ. 1526 (WX)

RICHARD J. DE FINA,

Plaintiff,

-against-

VIRGINIA M. ARMSTRONG, et al.

Defendants.

: 75 Civ. 1564 (WX)

RICHARD J. DE FINA,

Plaintiff,

-against-

CLARENCE M. KELLY, et al.,

Defendants.

: 75 Civ. 2119 (WX)

RICHARD J. DE FINA,

Plaintiff,

-against-

RITCHIE WILLIAMS, et al.,

Defendants.

: 75 Civ. 2362 (WX)

MADeline DE FINA,

Plaintiff,

-against-

ROBERT J. DRUMMOND, et al.,

Defendant.

: 75 Civ. 2681 (WX)

NOT APPEALING

BEST COPY AVAILABLE

Complaints having been filed in these actions on March 27, 1975 (75 Civ. 1526), March ³¹ 21, 1975 (75 Civ. 1564), May 5, 1975 (75 Civ. 2119), May 19, 1975 (75 Civ. 2362), and June 4, 1975 (75 Civ. 2681), and the federal defendants having moved on October 8, 1975 for consolidation of the actions and, as consolidated, for an order dismissing the complaints therein, and nonfederal defendant ITT Federal Laboratories having moved on October 29, 1975 to dismiss the two actions in which it is named as a defendant (75 Civ. 2362 ✓ and 75 Civ. 2681) for lack of diversity jurisdiction, and plaintiffs having filed numerous motions on various dates and the Court having considered all of the aforesaid motions and having filed a memorandum opinion on February 26, 1976 ordering the following:

1. Consolidating the above-captioned actions;
2. Treating defendants' motions as motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure;
3. Dismissing all Freedom of Information Act claims in 75 Civ. 2681 for failure to exhaust administrative remedies;
4. Dismissing all claims of libel, slander and defamation against the federal defendants pursuant to 28 U.S.C. §2680(h).
5. Dismissing the complaints in 75 Civ. 2362 and 75 Civ. 2681 as to ITT Federal Laboratories for lack of diversity jurisdiction;
6. Dismissing the complaints in 75 Civ. 2362 and 75 Civ. 2681 as to defendant Thomas J. Hinegue for failure to plead proper jurisdiction;
7. That the federal defendant United States Civil Service Commission disclose to plaintiffs its certificates of eligibles in unexpurgated form;

8. That the Government furnish the Court with the Drug Enforcement Administration ("DEA") report of investigation for in camera review; and
9. That the Government correctly applied exemptions 5, 6 and 7 of the Freedom of Information Act, 5 U.S.C. §§552(b)(5) (6) and (7) in withholding internal memoranda and the identities of persons within and outside the respective federal agencies who supplied information and evaluations to the Government;

and the plaintiffs having moved on March 1, 1976 inter alia for reconsideration of the Court's decision to dismiss the complaints in 75 Civ. 2362 and 75 Civ. 2681 as against defendant Minegue for failure to properly plead diversity jurisdiction, and the Government having furnished the Court on March 6, 1976 with the aforementioned DEA report of investigation in unexpurgated form for in camera review, and the Court having proposed on March 9, 1976 that the Government release said report in redacted form and further having issued a supplemental memorandum and order on March 17, 1976 granting plaintiffs' motion for reconsideration with respect to the Court's dismissal of the complaints in 75 Civ. 2362 and 75 Civ. 2681 with respect to defendant Minegue and vacating that portion of its decision of February 26, 1976 which dismisses those complaints as to said defendant, and the Government having released to plaintiffs the aforementioned DEA report of investigation as redacted by the Court and further having moved on March 23, 1976 for reconsideration of the Court's memorandum and order of February 26, 1976 to the extent that it directed the Government to release the aforementioned certificates of eligibles in unexpurgated form, and

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a hearing having been held on April 9, 1976 on the issue of whether defendant Minogue was properly served, and the Court having issued on April 20, 1976 a supplemental memorandum and order granting the Government's motion for reconsideration and finding that the aforementioned certificates of eligibles were exempt from disclosure in unexpurgated form pursuant to exemption 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(6) and therefore reversing its prior decision in this matter, and the Court having issued a further supplemental memorandum and order on April 20, 1976 dismissing the complaints in 75 Civ. 2362 and 75 Civ. 2681 as to defendant Minogue for lack of proper service; it is hereby
ORDERED, ADJUDGED AND DECREED

(a) that all Freedom of Information Act claims in 75 Civ. 2681 are dismissed;

(b) that all common law claims of libel, slander and defamation against the federal defendants are dismissed;

(c) that the complaints in 75 Civ. 2362 and 75 Civ. 2681 are dismissed as to defendants ITT Federal Laboratories and Minogue;

(d) that the federal defendants' motion for judgment on the pleadings, treated as a motion for summary judgment, is granted with respect to all remaining Freedom of Information Act claims except with respect to the aforementioned NSA report of investigation which has been disclosed to plaintiffs in redacted form as directed by the Court; and

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(e) that except as hereinabove granted, each of the complaints is dismissed with prejudice and without costs to any party.

Dated: New York, New York

May 18, 1976

U. S. D. J.

JUDGMENT ENTERED:

15/ RAYMOND F. BURGHARDT
Clerk

COPY RECEIVED

Robert B. Fiske, Jr.
UNITED STATES ATTORNEY

8/27/76

Marian J. Bryant